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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM CECIL THORNTON,)	Civil No. 10cv01583 BTM (RBB)
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION FOR APPOINTMENT OF
)	COUNSEL [ECF NO. 7]
v.)	
)	
ARNOLD SCHWARZENEGGER, Governor)	
of California; MATTHEW CATE,)	
Secretary of Corrections; JOHN)	
DOE LEWIS, Parole Unit)	
Supervisor; MARK JOSEPH, Parole)	
Agent; CHRISTINE CAVALIN,)	
Parole Agent; JOHN DOE #1,)	
Parole Agent,)	
)	
Defendants.)	
)	

Plaintiff William Cecil Thornton, a state prisoner proceeding pro se and in forma pauperis, filed a Complaint on July 28, 2010, pursuant to 42 U.S.C. § 1983 [ECF Nos. 1, 5]. In count one, Thornton alleges that his constitutional rights to due process, freedom of association, and to be free from cruel and unusual punishment were violated when he was not allowed to live with his wife in their home after being released on parole. (Compl. 3.) In count two, Thornton argues that his rights to be free from cruel

1 and unusual punishment, to due process, and to his "interest of
2 liberty" were violated when Plaintiff was assigned to a sex
3 offender parole unit in California based on his out-of-state
4 criminal record. (Id. at 4.) Finally, in count three, Thornton
5 alleges his right to equal protection of the laws was violated
6 because he was discriminated against. (Id. at 4-5.) Specifically,
7 he complains that he was "banished" from moving back in with his
8 wife in their home because he was "told it was not in[]compliance
9 with Proposition 83 or California Penal Code § 3003.5." (Id. at 5
10 (citation omitted).) But another sex offender assigned to the same
11 parole unit started an intimate relationship with Thornton's wife
12 and was permitted to move into the same home with her, even though
13 Plaintiff was prohibited from doing so. (Id.)

14 On August 25, 2010, Thornton filed this Motion for Appointment
15 of Counsel [ECF No. 7]. In support of his request, Plaintiff
16 asserts the following: (1) He is unable to afford an attorney; (2)
17 his imprisonment limits his ability to litigate; (3) the issues in
18 this case are complex and require significant research; (4)
19 Thornton has limited law library access and knowledge of the law;
20 and (5) a trial will likely involve conflicting testimony and legal
21 issues. (Mot. Appointment Counsel 2-3.)

22 28 U.S.C. § 1915(e)(1) provides, "The court may request an
23 attorney to represent any person unable to afford counsel." 28
24 U.S.C.A. § 1915(e)(1) (West 2010). But "it is well-established
25 that there is generally no constitutional right to counsel in civil
26 cases." United States v. Sardone, 94 F.3d 1233, 1236 (9th Cir.
27 1996) (citing Hedges v. Resolution Trust Corp., 32 F.3d 1360, 1363
28 (9th Cir. 1994)). There is also no constitutional right to

1 appointed counsel to pursue a § 1983 claim. Rand v. Rowland, 113
2 F.3d 1520, 1525 (9th Cir. 1997) (citing Storseth v. Spellman, 654
3 F.2d 1349, 1353 (9th Cir. 1981)); accord Campbell v. Burt, 141 F.3d
4 927, 931 (9th Cir. 1998). Federal courts do not have the authority
5 "to make coercive appointments of counsel." Mallard v. United
6 States Dist. Court, 490 U.S. 296, 310 (1989) (discussing section
7 1915(d)); see also United States v. \$292,888.04 in U.S. Currency,
8 54 F.3d 564, 569 (9th Cir. 1995).

9 Nevertheless, district courts have discretion, pursuant to 28
10 U.S.C. § 1915(e)(1), to request attorney representation for
11 indigent civil litigants upon a showing of exceptional
12 circumstances. See Agyeman v. Corrs. Corp. of Am., 390 F.3d 1101,
13 1103 (9th Cir. 2004) (citing Franklin v. Murphy, 745 F.2d 1221,
14 1236 (9th Cir. 1984)); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th
15 Cir. 1991); Burns v. County of King, 883 F.2d 819, 824 (9th Cir.
16 1989). "A finding of the exceptional circumstances of the
17 plaintiff seeking assistance requires at least an evaluation of the
18 likelihood of the plaintiff's success on the merits and an
19 evaluation of the plaintiff's ability to articulate his claims 'in
20 light of the complexity of the legal issues involved.'" Agyeman,
21 390 F.3d at 1103 (quoting Wilborn v. Escalderon, 789 F.2d 1328,
22 1331 (9th Cir. 1986)). "'Neither of these factors is dispositive
23 and both must be viewed together before reaching a decision.'" Terrell,
24 935 F.2d at 1017 (quoting Wilborn, 789 F.2d at 1331).

25 **I. Likelihood of Plaintiff's Success on the Merits**

26 To receive court-appointed counsel, Thornton must present a
27 nonfrivolous claim that is likely to succeed on the merits.
28 Wilborn, 789 F.2d at 1331. Plaintiff alleges in the Complaint that

1 his constitutional rights to due process, freedom of association,
2 to be free from cruel and unusual punishment, and to equal
3 protection of the laws were violated. (Compl. 3-5.) These
4 allegations arise from events that occurred while Plaintiff was
5 incarcerated at R.J. Donovan State Prison ("Donovan") and after he
6 was released on parole.¹ (Id. at 1.)

7 In count one, Thornton claims he had been incarcerated for a
8 parole violation and was released on November 10, 2007. (Id. at
9 3.) "[B]efore my release[] I was served with papers on 9-17-07
10 that stated I would not be allowed to live at my home with my wife
11 because of provisions of Proposition 83, that was applied to me
12 because of an 1987 Tennessee case." (Id.) He asserts this
13 constitutes a violation of his rights to due process, freedom of
14 association, and to be free from cruel and unusual punishment.
15 (Id.)

16 In count two, Plaintiff argues that on November 21, 2007, he
17 was "assigned to a GPS unit of parole and given very overbroad
18 conditions of parole" as a result of his out-of-state criminal
19 record. (Id. at 4.) "I was assigned to a sex offender unit of
20 parole [and] to an Agent Christine Cavalin." (Id.) Thornton
21 claims that this rises to the level of a violation of his right to
22 be free from cruel and unusual punishment and to due process.
23 (Id.)

24 Further, in count three, Plaintiff contends that in November
25 2007, he was not permitted to reside with his wife in their home
26 because he was "told it was not in compliance with Proposition 83
27

28 ¹ Currently, Thornton is incarcerated at the California
Correctional Institution at Tehachapi, California. (Compl. 1.)

1 or California Penal Code § 3003.5. (Id. at 5.) But in 2008,
2 another sex offender in Thornton's parole unit, Richard Lilly,
3 moved into Plaintiff's residence. (Id.) "[Lilly] started an
4 [intimate] relationship with my wife and was allowed to move into
5 the very home I was told was out of compliance to me as a sex
6 offender." (Id.) Plaintiff complains that he is discriminated
7 against, in violation of his right to equal protection of the laws.
8 (Id.)

9 Prisoners may not be deprived of "life, liberty, or property
10 without due process of law." Wolff v. McDonnell, 418 U.S. 539, 556
11 (1974). A plaintiff may allege a violation of procedural due
12 process by claiming defendants failed to employ fair procedures to
13 deprive him of a protected liberty interest. See Zinermon v.
14 Burch, 494 U.S. 113, 127 (1990); Kentucky Dep't of Corrs. v.
15 Thompson, 490 U.S. 454, 460 (1989); Hewitt v. Helms, 459 U.S. 460,
16 466 (1983); Walker v. Sumner, 14 F.3d 1415, 1419 (9th Cir. 1994)
17 (discussing liberty interest arising out of disciplinary
18 proceedings). A protected liberty interest may arise under the Due
19 Process Clause itself or a federal statute or regulation. Kentucky
20 Dep't of Corrs., 490 U.S. at 460; Hewitt, 459 U.S. at 466. But the
21 liberty interest protected by statute or regulation is generally
22 limited to freedom from restraint that "imposes atypical and
23 significant hardship on the inmate in relation to the ordinary
24 incidents of prison life." Sandin v. Connor, 515 U.S. 472, 483-84
25 (1995).

26 As to a prisoner's right to freedom of association, "[a]
27 prison inmate retains those First Amendment rights that are not
28 inconsistent with his status as a prisoner or with the legitimate

1 penological objectives of the corrections system.'" Johnson v.
2 California, 543 U.S. 499, 510 (2005) (quoting Pell v. Procunier,
3 417 U.S. 817, 822 (1974)). But the associational rights of
4 prisoners are, by necessity, restricted and "may be curtailed
5 whenever the institution's officials, in the exercise of their
6 informed discretion, reasonably conclude that such associations
7 . . . possess the likelihood of disruption to prison order or
8 stability, or otherwise interfere with the legitimate penological
9 objectives of the prison environment." Jones v. N.C. Prisoners'
10 Labor Union, Inc., 433 U.S. 119, 132 (1977); Rizzo v. Dawson, 778
11 F.2d 527, 532 (9th Cir. 1985).

12 Although an inmate has the right to be free from cruel and
13 unusual punishment, "the treatment a prisoner receives and the
14 conditions under which he is confined are subject to scrutiny under
15 the Eighth Amendment." Helling v. McKinney, 509 U.S. 25, 31
16 (1993). The Eighth Amendment "requires that inmates be furnished
17 with the basic human needs, one of which is 'reasonable safety.'" Id.
18 at 33 (quoting DeShaney v. Winnebago County Dep't of Soc.
19 Servs., 489 U.S. 189, 200 (1989)). "To violate the Cruel and
20 Unusual Punishment Clause, a prison official must have a
21 'sufficiently culpable state of mind.'" Farmer v. Brennan, 511
22 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 297
23 (1991)).

24 Moreover, "[i]nmates are protected under the Equal Protection
25 Clause against invidious discrimination." Johnson v. Van Boening,
26 No. C07-5426RBL-KLS, 2008 U.S. Dist. LEXIS 80776, at *13 (W. D.
27 Wash. Sept. 3, 2008) (citing Wolff, 418 U.S. at 556; Lee v.
28 Washington, 390 U.S. 333, 334 (1968)). To state an equal

1 protection violation claim, "a plaintiff must show that the
2 defendants acted with an intent or purpose to discriminate against
3 the plaintiff based upon membership in a protected class." Barren
4 v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). Protected
5 classes include race, religion, national origin, and poverty.
6 Damiano v. Florida Parole & Probation Comm'n, 785 F.2d 929, 932-33
7 (11th Cir. 1986). Further, the Fourteenth Amendment is not
8 violated by unintentional conduct that may have a disparate impact.
9 Washington v. Davis, 426 U.S. 229, 239 (1976).

10 Although Thornton's allegations may be sufficient to state a
11 claim for relief, it is too early for the Court to determine
12 Plaintiff's likelihood of success on the merits. Without
13 additional factual information, the Court cannot conclude whether
14 Thornton is likely to succeed. See Bailey v. Lawford, 835 F. Supp.
15 550, 552 (S.D. Cal. 1993).

16 **II. Plaintiff's Ability To Proceed Without Counsel**

17 To be entitled to appointed counsel, Thornton must also show
18 he is unable to effectively litigate the case pro se in light of
19 the complexity of the issues involved. See Wilborn, 789 F.2d at
20 1331.

21 Courts have required that "indigent plaintiffs make a
22 reasonably diligent effort to secure counsel as a prerequisite to
23 the court's appointing counsel for them." Bailey, 835 F. Supp. at
24 552. Here, Plaintiff has not shown that he made any efforts to
25 secure counsel. (See Mot. Appointment Counsel 1-3.) He has
26 therefore not made a reasonably diligent effort to secure counsel
27 prior to petitioning for appointment of counsel.

28

1 Thornton advances several arguments to support his request for
2 attorney representation. First, he claims he is unable to afford
3 legal counsel, and he refers to his request to proceed in forma
4 pauperis [ECF No. 2]. (Id. at 2.) Even though he was granted in
5 forma pauperis status [ECF No. 5], his argument is not compelling
6 because indigence alone does not entitle a plaintiff to appointed
7 counsel.

8 Next, Plaintiff argues that his imprisonment will limit his
9 ability to litigate. (Id.) Although he asserts that his access to
10 legal materials is limited, Thornton has not demonstrated that he
11 is being denied "reasonable" access. See Lindquist v. Idaho State
12 Bd. of Corrs., 776 F.2d 851, 858 (9th Cir. 1985). "[T]he
13 Constitution does not guarantee a prisoner unlimited access to a
14 law library. Prison officials of necessity must regulate the time,
15 manner, and place in which library facilities are used." Id.
16 (citation omitted). Thornton has not shown that he does not have
17 reasonable access to a law library or other means of conducting
18 legal research, or that he is subjected to burdens beyond those
19 ordinarily experienced by pro se plaintiffs.

20 Plaintiff maintains the issues involved in the case are
21 complex and will require significant research. (Mot. Appointment
22 Counsel 2.) But again, Thornton has not alleged that he lacks
23 reasonable access to the law library or other means of performing
24 legal research. See Lindquist, 776 F.2d at 858. Nor has he shown
25 that his limitations are greater than those ordinarily experienced
26 by pro se plaintiffs.

27 Thornton also contends he has limited access to legal
28 materials and limited knowledge of the law. (Mot. Appointment


1 Counsel 2.) Plaintiff's Complaint is adequate in form. Also,
2 Thornton was able to file motions for leave to proceed in forma
3 pauperis and for appointment of counsel, which suggests an ability
4 to navigate the legal process. See Plummer v. Grimes, 87 F.3d
5 1032, 1033 (8th Cir. 1996) (finding the district court did not
6 abuse its discretion in denying plaintiff counsel, in part because
7 plaintiff adequately filed a complaint and other pre-trial
8 materials). "[A]ny pro se litigant certainly would be better
9 served with the assistance of counsel." Rand, 113 F.3d at 1525;
10 see also Wilborn, 789 F.2d at 1331 ("[A] pro se litigant will
11 seldom be in a position to investigate easily the facts necessary
12 to support the case.") But a plaintiff is only entitled to
13 appointed counsel if he can show "that because of the complexity of
14 the claims he [is] unable to articulate his positions." Rand, 113
15 F.3d at 1525. Thornton has not shown anything in the record that
16 makes this case "exceptional" or the issues in it particularly
17 complex.

18 Finally, Plaintiff complains that an attorney would help him
19 present evidence and cross-examine witnesses at trial due to the
20 likelihood of conflicting testimony. (Mot. Appointment Counsel 2-
21 3.) But factual disputes and anticipated cross-examination of
22 witnesses do not indicate the presence of complex legal issues
23 warranting a finding of exceptional circumstances. See Rand, 113
24 F.3d at 1525 (holding that while the appellant might have fared
25 better with counsel during discovery and in securing expert
26 testimony, this is not the test). Accordingly, the "exceptional
27 circumstances" required for appointment of counsel pursuant to 28
28 U.S.C. § 1915(e)(1) are absent.

1 Because Plaintiff has failed to demonstrate either a
2 likelihood of success on the merits or an inability to represent
3 himself (beyond the ordinary burdens encountered by prisoners
4 representing themselves pro se), Plaintiff's motion is **DENIED**
5 without prejudice.

6 **IT IS SO ORDERED.**

7 DATE: October 4, 2010


8 _____
9 Ruben B. Brooks
10 United States Magistrate Judge

11 cc: Judge Moskowitz
12 All Parties of Record
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